

Issue: Administrative Review of Hearing Officer's decision in Case No. 10012; Ruling  
Date: April 22, 2013; Ruling No. 2013-3554; Agency: Department of Behavioral  
Health and Developmental Services; Outcome: Remanded to AHO.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resources Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2013-3554  
April 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10012. For the reasons set forth below, the decision is remanded to the hearing officer for further clarification.

FACTS

The relevant facts as set forth in Case Number 10012 are as follows:<sup>1</sup>

The Department of Behavioral Health and Developmental Services employed Grievant as a DSA II at one of its facilities. He had been employed by the Agency for approximately two years.

Grievant had prior active disciplinary action. On July 10, 2012, he received a Group II Written Notice for refusal to work emergency overtime. On October 3, 2012, he received a Group II Written Notice for refusal to work emergency overtime.

The Client is a 61 year old male with severe mental disabilities. He functions in a “moderate range of mental retardation/intellectual disability.” The Client has a history of self-injurious behavior as well as aggressive and other socially inappropriate behaviors.

In July 2012, the Agency added a new strategy to decrease falls by requiring “Increased supervision during bathing (2 staff: 1 individual)”. Grievant was advised of the requirement but on several occasions he failed to comply with the requirement because he believed it was easier to have one person in the shower room with the Client rather than having two staff which could trigger adverse behavior by the Client. The Supervisor observed Grievant not taking a

---

<sup>1</sup> Decision of Hearing Officer, Case No. 10012 (“Hearing Decision”), February 22, 2013 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

second person with him to shower the Client. She instructed Grievant to take a second person with him every time he showered any client.

On November 10, 2012, Grievant went to the Client's room and noticed the Client was displaying self-injurious behavior of scratching and hitting his head. Grievant redirected the Client to the Day Hall and the Client calmed down and fell asleep in his wheelchair. At approximately 7 p.m., Grievant took the Client to the shower room. Grievant did not obtain a second employee to assist him with showering the Client. When the Client was moving from his wheelchair to the shower chair, the Client grasped the safety bar using only his right hand. The Client typically used both arms to grab the safety bar. The Client showered without displaying self-injurious behavior. Grievant began drying the Client at the completion of the shower. The Client began hitting his arms against the shower chair. The Client kicked his legs which caused an injury to his toe. Grievant attempted to redirect the Client while the Client was engaging in self-injurious behavior.

The Agency later determined that the Client had a laceration to his fifth left toe and bruising to his left hand and arm. X-rays were taken and he was discovered to have a fracture of the ulna of his left arm. The Client received four sutures to the injured toe.

In the January 28, 2013 hearing decision, the hearing officer reduced the Group III Written Notice issued by the agency for the charge of abuse or neglect to a Group II Written Notice for failure to follow a supervisor's instructions, but upheld the removal of the grievant based on the accumulation of disciplinary action.<sup>2</sup> The grievant now seeks administrative review from EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."<sup>3</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>4</sup>

#### *Inconsistency with Agency Policy*

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>5</sup> The grievant has

---

<sup>2</sup> *Id.* at 5.

<sup>3</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>5</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

requested such a review. Therefore, the grievant's policy arguments will not be addressed in this ruling.

### *Due Process*

The grievant argues that the hearing officer erred by upholding the discipline based on an offense, failure to follow a supervisor's instructions, not specifically included on the Written Notice. As such, the grievant alleges that his due process rights have been violated. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"<sup>6</sup> is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.<sup>7</sup> However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Further, as mentioned above, we note that the grievant has requested administrative review from the DHRM Director. The DHRM Standards of Conduct contain a section expressly entitled "Due Process."<sup>8</sup> The DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.<sup>9</sup> Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."<sup>10</sup>

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and an

---

<sup>6</sup> E.g., *Davis v. Pak*, 856 F.2d 648, 651 (4<sup>th</sup> Cir. 1988); *see also Huntley v. N.C. State Bd. Of Educ.*, 493 F.2d 1016, 1018-21 (4<sup>th</sup> Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing).

<sup>7</sup> *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>8</sup> *See* Department of Human Resource Management Policy 1.60 §E.

<sup>9</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). State policy requires:

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

*See* Department of Human Resource Management Policy 1.60 §E. Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

<sup>10</sup> *Loudermill*, 470 U.S. at 546.

opportunity for the presence of counsel.<sup>11</sup> The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.<sup>12</sup>

In this case, the description of the offense in the Written Notice stated:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse of Clients. A facility investigation substantiated that on 11/16/12, you failed to provide a safe environment for an individual [resident's initials], which resulted in a fracture of his left arm.

The grievant argues in his request for administrative review that the hearing officer upheld the discipline issued to him for a "separate and distinct offense," failure to follow a supervisor's instructions. Section VI(B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."<sup>13</sup> Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.<sup>14</sup> In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."<sup>15</sup> Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

While we do not necessarily agree that the grievant was denied due process in this instance, we find that the hearing decision lacks supporting detail that would allow EDR to render a determination regarding this issue. Failure to follow a supervisor's instructions, presumably regarding how to provide a safe environment for residents, may be sufficiently related to the information provided to the grievant about the alleged behavior in this instance such that no violation of the grievant's right to due process occurred. However, the agency, which bears the burden of proof at hearing, must provide notice of charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. As the decision does not specifically address this issue, EDR directs the hearing officer to provide further explanation of his factual findings with respect to the charges for which the grievant was

---

<sup>11</sup> *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-561 (4<sup>th</sup> Cir. 1983) (Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

<sup>12</sup> See Va. Code § 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. See Va. Code §§ 2.2-3005 and 3006; see also *Grievance Procedure Manual* §§ 5.7, 5.8, discussing the authority of the hearing officer and the rules for the hearing.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B) (citing *O'Keefe v. United States Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

<sup>14</sup> See EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

<sup>15</sup> *Rules for Conducting Grievance Hearings* § I.

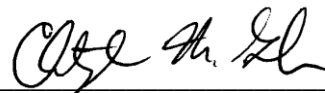
on notice and the charges fairly considered by the hearing officer in making his determination. Accordingly, we remand the hearing decision for an explanation and/or reconsideration of the grievant's failure to follow a supervisor's instructions and that offense's relation to the charges set forth on the Written Notice and all documentation provided to the grievant as part of pre-disciplinary due process.

To the extent that the grievant argues that he was denied due process because the Written Notice lists November 16, 2012 as the date of the alleged offense and the agency did not prove nor did the hearing officer find, that the grievant failed to follow a supervisor's instructions on that day, we find this argument without merit. The Written Notice lists "11/10/12" as "Offense Date", and the November 29, 2012 due process letter provided to the grievant also states that "A recent administrative investigation [Case Number] regarding client abuse/neglect has given us cause to believe that, on or about 11-10-2012, you failed to provide a safe environment for an individual [resident's initials] which resulted in a fracture of the ulna of his left arm."<sup>16</sup> Thus, it would appear that the agency erroneously listed the date that the offense occurred as November 16, 2012 within Section II of the Written Notice.

Despite the error in the date on the Written Notice, it is evident that the grievant was on notice that he was being disciplined for findings that resulted from the agency's investigation into a particular resident's arm fracture. The grievant has identified nothing pertaining to the date error that precluded him from mounting a defense to the agency's allegations. Therefore, we decline to disturb the decision of the hearing officer on this basis.

#### CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration as set forth above. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>17</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>18</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>19</sup>



Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>16</sup> Agency Exhibit 3.

<sup>17</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>18</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>19</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).